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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the matter of:

Amendment of Parts 20 and 24 of the)
Commission's Rules -- Broadband)
PCS Competitive Bidding and the)
Commercial Mobile Radio Service)
Spectrum Cap)
Amendment of the Commission's)
Cellular/PCS Cross-Ownership Rule)

WT Docket No. 96-59

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To: The Commission

PETITION FOR STAY PENDING RECONSIDERATION

THE NATIONAL PAGING & PERSONAL COMMUNICATIONS ASSOCIATION:
PERSONAL TECHNOLOGY SERVICES, INC.; and DIGIVOX CORPORATION (collectively
"Joint Petitioners") acting through their counsel and in accordance with Sections 1.41, 1.43, and
1.44(e) of the Commission's rules, 47 C.F.R. §§ 1.41, 1.43, and 1.45(d), hereby jointly petition
the Commission to stay the D, E, and F block PCS auctions, Public Notice, DA 96-1026,
released June 26, 1996, as modified, Public Notice DA 96-1064, released July 1, 1996, as a result
of certain changes adopted by the Commission in its *Report & Order*, in the matter of
*Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive
Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the
Commission's Cellular/PCS Cross-Ownership Rule* 11 FCC Rcd 7824 (Slip Op. FCC 96-278,

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released June 24, 1996) ("Report & Order"). In support of their Petition for Stay, the Joint Petitioners set forth the following:

I. INTRODUCTION AND SUMMARY

Section 309(j) of the Communications Act directs the Commission to ensure that small businesses, members of minority groups, women, and rural telephone companies are given the opportunity to participate in the provision of spectrum-based services like PCS. 47 U.S.C. §§ 309(j)(3)(B), 309(j)(4)(C)(ii), and 309(j)(4)(D). To comply with this Congressional mandate, the Commission set aside the broadband PCS C and F blocks for entrepreneurial bidders, and it determined that for these auctions, it would provide a combination of bidding discounts and installment payment plans that would permit the most-favored small businesses to purchase the spectrum with only a ten percent down payment without having to pay the principal until six years out, after the businesses had the opportunity to develop some cash flow.^{1/}

The Commission fostered the goal of minority and women participation through these small business advantages in the C block auction. However, in its latest Report & Order, the Commission dramatically changed the rules for the F block auction to revoke the advantages that it had earlier found necessary to enable small businesses to participate in the provision of PCS. Specifically, the Commission increased the upfront payment required of small business fourfold,

^{1/} In addition, Section 257 of the Telecommunications Act of 1996 (P.L. 104-104, 110 Stat. 56 (1996)) ("96 Telecom Act") required the FCC to eliminate market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services, and the Commission has initiated a proceeding to do so. In re Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Notice of Inquiry, FCC 96-216, released May 21, 1996.

it doubled the required down payment, and it reduced the interest-only payment period by two-thirds.

Adding insult to injury, the Report & Order, which incorporates these dramatic changes, was released only 37 days before the filing date for the FCC Form 175 applications for the D, E, and F block auctions, leaving small businesses, which had relied on the former advantages in preparing their bidding and business strategies, little time to arrange to bear the additional financial burdens imposed by the sudden and unexpected withdrawal of the small business advantages.

The Joint Petitioners have challenged this Commission action in a Petition for Reconsideration that was filed with the Commission on July 17, 1996. Because the Joint Petitioners would be irreparably injured by the implementation of the Report & Order during the pendency of the Commission's consideration of their Petition for Reconsideration, they hereby request that the Commission stay the D, E, and F block auction process until the FCC has had the opportunity to act upon that Petition.

II. THE COMMISSION SHOULD STAY THE F BLOCK AUCTIONS

The Commission will grant a stay where the Petitioner establishes that (A) it is likely to prevail on the merits; (B) without such relief, it will be irreparably injured; (C) issuance of a stay would not substantially harm other parties interested in the proceedings; and (D) the public interest weighs in favor of a stay.^{2/} Because the Joint Parties satisfy each of these tests, a stay of

^{2/} *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in *Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d (continued...)

the D, E, and F block auctions is clearly warranted in this case.

A. The Joint Petitioners are Likely to Prevail on the Merits of the Petition for Reconsideration

As demonstrated in the Petition for Reconsideration, the Commission substantially departed from Congress's mandate in Section 309(j) when it developed the rules for the F block auction. In Section 309(j), Congress directed the Commission to ensure that small businesses, members of minority groups, women, and rural telephone companies are given an opportunity to participate in the provision of spectrum based services like PCS. As explained in footnote 1 above, Section 257 of the 96 Telecom Act is of similar direction.

While the Commission initially observed this directive by providing generous advantages to small businesses in the C block auctions, it subsequently disregarded Congress's mandate by eliminating for the F block auctions the very advantages that had made the C block spectrum accessible to small businesses. By increasing the upfront payment fourfold, doubling the required down payment, and reducing the interest-only payment period by two-thirds, the Commission, contrary to its statutory directive, makes small business participation in PCS substantially more difficult. Further, when exacerbated by the Commission's unrealistic schedule, these hurdles make the participation of some small businesses not only difficult, but utterly impossible. See Exhibits 1 and 2. For example, changes in loan repayment schedules, fees, and interest payments necessitated by adoption of the new rules disrupts the financial arrangements that small businesses, such as the Joint Petitioners, have made in anticipation of the

^{2/} (...continued)
841, 843 (D.C. Cir. 1977).

F block auction. In addition, the new rules make it difficult for small businesses to attract new investors or additional support from current ones, as investors are less willing to invest in projects with higher upfront costs.

Through its adoption of the new rules, the Commission effectively denies small businesses the opportunity to provide PCS service in the F block spectrum, and in so doing violates its continuing statutory obligation under Section 309(j) to ensure that such businesses are able to participate in PCS.

B. Without a Stay, The Joint Petitioners will be Irreparably Injured

In light of the heavy workload borne by the Commission in implementing the 96 Telecom Act, it is unlikely that the Commission will have time to consider the Petition for Reconsideration prior to the July 31, 1996 acceptance date for FCC Form 175 D, E, and F block applications, or even the August 12, 1996 deadline for upfront payments. If the Commission proceeds with the D, E, and F block auctions before acting on the Petition for Reconsideration, the Petition will be rendered moot, and upon the arrival of the July 31, 1996 filing deadline, those small businesses that are effectively precluded by the new rules from applying for F block spectrum will forever be barred from participating in the F block auctions.

Even if some small businesses, despite their inability to arrange for necessary additional funding by the filing deadline, nevertheless submit F block applications in the hope that they will eventually find increased financial backing under the new rules, they would still ultimately suffer irreversible harm by August 12, 1996, when they are unable to remit the substantial upfront payments required to be made on that date pursuant to the Report & Order.

C. Issuance of a Stay would not Substantially Harm Other Interested Parties

A stay of the D, E, and F block auctions would not cause substantial harm to be suffered by any interested party. While a stay would somewhat delay the provision of PCS service by the ultimate winners of the auctions, such a short delay would result in nothing more than a mere inconvenience to those parties who intend to bid in the D, E, and F block auctions. Parties who are most likely to object to the stay are multibillion dollar corporations that are self-funding their license acquisition costs and are not relying on fragile investment relationships that can be shattered by adverse changes in the auction rules. The only injury caused by issuance of the requested stay to such companies would not even amount to a rounding error on their financial statements.

D. The Public Interest Lies in the Issuance of a Stay

Grant of the Joint Parties' Petition for Reconsideration would result in a greater number of parties (especially small companies) being able to participate vigorously in the PCS auctions by making such participation once again economically feasible for them. Congress has already deemed such widespread participation to be in the public interest. When it granted the Commission authority to conduct auctions for the issuance of certain licenses, Congress was concerned that selling licenses simply to the highest bidder would concentrate ownership of spectrum in the hands of the nation's richest and largest companies. Its determination that such a concentration of ownership would not be in the public interest led Congress to include certain provisions of Section 309(j) which require the Commission to promote diversity of licensing. Congress found that the diversification of licenses to the hands of small businesses, among

others, would reflect the diversity of this nation's citizenship and would promote the development of new and innovative communications services and technologies, which are often introduced to the market by smaller entrepreneurs. Section 257 of the 96 Telecom Act reflects similar legislative sentiment. Without an issuance of the stay herein requested, many of those innovative small businesses will be permanently barred from participation in the PCS auctions, contrary to the public interest.

III. A Stay is the Appropriate Remedy Under the Circumstances

The Joint Petitioners considered requesting expedited consideration of their Petition for Reconsideration in lieu of the stay herein requested. However, it would be impractical to expect that the Commission could act upon the Petition for Reconsideration before the D, E, and F block filing date of July 31, 1996, or even the upfront payment deadline of August 12, 1996, especially in light of the Commission's heavy workload that has ensued as a result of its efforts to implement the recently enacted 96 Telecom Act. Consequently, a stay of the D, E, and F block auctions would be the most practical, reasonable, and fair remedy under the circumstances.

IV. Conclusion

The Commission, in adopting its most recent Report & Order, violated Congress's mandate that requires the Commission to ensure small business participation in PCS. Instead, the auction rules that are incorporated in the Report & Order effectively preclude small businesses from participating in the D, E, and F block PCS auctions. Further, once the impending filing date for the D, E, and F block auctions arrives, the Congressionally protected small businesses will forever be precluded from providing service in the F block spectrum. On

the other hand, however, other interested parties, which are not adversely impacted by the rule, would suffer little more than a slight inconvenience from the short delay that a grant of this stay would cause. For the above reasons, and because the public interest would be served by the development of new and innovative communications services and technologies that would result from the participation of small businesses in PCS, the Commission should grant the stay requested herein.

WHEREFORE, in light of the foregoing, the Joint Petitioners request that the Commission issue a stay of the D, E, and F block auctions consistent with this Petition.

Respectfully submitted,

THE NATIONAL PAGING & PERSONAL
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Their Counsel


DATED: July 22, 1996

DECLARATION OF JOHN PRAWAT

1. I, John Prawat, am the President of DigiVox Corporation ("DigiVox"). DigiVox is a small business which, for the last several years, has been preparing to participate in the Federal Communications Commission ("FCC") auctions for broadband Personal Communications Services ("PCS"). DigiVox filed an FCC Form 175 for the C Block auction, but for various reasons beyond its control did not participate in the bidding.
2. DigiVox was in the final stages of implementing a business plan and agreement which would have been the basis for its participation in the F Block PCS auction when the Commission announced its recent rule changes and the tight schedule for filing FCC Form 175 and making the increased upfront payment. The agreement would have brought a demonstrably successful investor into DigiVox and, in DigiVox's view, ensured its financial ability to participate in the F Block auction in accordance with the Commission's previous rules. This view is based on the fact that this investor had successfully raised very substantial sums of investment capital for the leading C Block auction winner, and due to the nature of DigiVox's business plan.
3. As a direct and proximate result of the Commission's late June rule changes, that agreement collapsed and, absent a stay of the F Block auction, DigiVox will be prevented from participating in the auction. A principal reason for the collapse was the Commission's schedule. It gave DigiVox little or no time to adjust its business plan and economic model to accommodate the rule changes and explain them to prospective investors. Again, the impact of the rule changes will frustrate DigiVox's efforts over the last several years to participate in the PCS auction.
4. The Commission's actions produced a similar result when DigiVox had discussions with a major equipment manufacturer concerning vendor financing for DigiVox's auction participation efforts. The necessity of readjusting business plans and economic models in a very short timeframe caused the manufacturers to determine that they would be unable to provide financing for DigiVox because there was insufficient time to review and assess revised business plans and models as a basis for making a final financing decision.
5. The bottom line is that DigiVox will be irreparably harmed if the current F Block auction schedule holds, even apart from the impact of the drastic rule changes imposed by the FCC. It will be left without any chance to participate, locked out by the FCC's last-minute modifications.
6. As to those modifications, the need for such changes and their degree is highly questionable. The operation of the auction process in the C Block does not warrant a fourfold increase in the upfront payment amount. The prospect of defaults and the history of C Block defaults does not support such an increase. The other

changes similarly are not warranted by the C Block experience. The Commission should, in particular, rethink the shortening of the period of interest-only payments. As currently structured, this would require small businesses, in a highly competitive market, to start paying principle in the third year while their C Block competitors have 3 years more on an interest-only basis. This will make it exceedingly difficult for these F Block small business entrepreneurs to succeed.

I understand that this Declaration is to be submitted in support of a request to the Commission for a stay of the D, E and F Block auction. I declare, under penalty of perjury, that the foregoing statements and representations are true and correct to the best of my knowledge and belief.


John Prawat
President
DigiVox Corporation

Dated: July 22, 1996

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DECLARATION OF THOMAS GARLOCK

1. I, Thomas Garlock, am the Chairman of Personal Technology Services, Inc. ("PTS"), a small business, entrepreneur seeking entry into the Personal Communications Services ("PCS") field. PTS was a bidder in the Block C PCS auction, although it did not wind up as the high bidder on any licenses in that Block.
2. PTS has been actively developing its planned entry into PCS for the last 2 years. This development activity has included the preparation of detailed business plans and model for the purpose of raising capital and participating in the FCC auction process. These business plans and models have been based on the terms and requirements of the Commission's PCS rules, particularly those that relate to upfront payments, downpayments, bidders credits and financing over the term of the license. These economic aspects of the FCC's rules have a direct effect on PTS' business plans and models and therefore, on its participation in the FCC's auctions.
3. I have reviewed the FCC's recent actions modifying the PCS rules that will be applied to the F Block auction, in which PTS was planning to participate. The changes recently announced involving the upfront and down payments and the financing terms (i.e., interest only period) are from PTS's perspective terms very substantial. They have forced PTS to go back to the drawing board in terms of its business plans and models and engage in a complete reanalysis of the terms on which it might be able to participate in the F Block auction. When coupled with the schedule adopted by the Commission, these changes reflect a distinct lack of understanding of the efforts that small businesses must go through to raise significant investment capital.
4. These changes, in and of themselves, have severely disrupted PTS's planning and projections. While recognizing that the FCC had asked for comments on possible revisions to these elements of its rules, the Commission's actions in quadrupling the upfront payment, doubling the downpayment and reducing the interest-only repayment period by two-thirds are far beyond any reasonable business planner's expectations. The Commission did this without any warning.
5. However, in addition to making these dramatic revisions, the FCC has given small business entrepreneurs such as PTS essentially thirty (30) days to assess, react and implement the required changes to its business plans and models. This short time frame reflects the fact that the Commission has made its decision in a vacuum, divorced from any genuine appreciation of the real mechanics of how small businesses raise money. These practicalities make such a short time frame totally unrealistic, and indeed, unfair. IN PTS' case, it will not be possible, in such a short time, to reposition itself to participate in the F Block auction. To put it directly, the Commission's rule changes and schedule will keep PTS out of the F Block auction. I believe that they will have a similar effect on other prospective bidders.

6. PTS understands that the Commission has initiated a proceeding intending to identify and eliminate barriers for small business entry and participation into the communications industry. The Commission's last minute F Block rule changes erect a new barrier rather than removing an old one.
7. PTS investors and its principals will have expended nearly \$1 million dollars, along with many hours of their own time, to participate in the F Block auction. PTS is a serious perspective bidder, as it was in the C Block auction. I have been in the cellular industry since 1985, and I have built and operated RSA cellular systems. PTS is not some speculative endeavor that the Commission need be concerned about participating and defaulting. Yet the Commission's actions and schedule will keep it on the sidelines unless, at a minimum, the F Block action is delayed until the Commission can re-evaluate the real need for its drastic rule adjustments. The F Block auctions represent our final opportunity to acquire the PCS licenses necessary for our entry into this dynamic industry.
8. I understand that this Declaration will be submitted to the FCC in connection with a request for a stay of the Commission's new rules and schedule. I declare, under penalty of perjury, that the foregoing factual representations and statements are true and correct to the best of my knowledge and belief.


Thomas Garlock
Chairman
Personal Technology Services, Inc.

Dated: July 22, 1996

CERTIFICATE OF SERVICE

I, Denise Sullivan, a secretary at the law offices of Fisher Wayland Cooper Leader & Zaragoza L.L.P., hereby certify that a true copy of the foregoing "**PETITION FOR STAY PENDING RECONSIDERATION**" was hand delivered this 22nd day of July, 1996, to the following:

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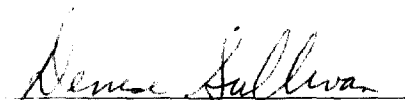
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